In The

# Supreme Court of the United States

October Term, 1978

No. 78-639

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 367,

*Petitioner,*

*vs.*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD N. KATZ
BRUCE E. ENDY
MERANZE, KATZ, SPEAR
& WILDERMAN
*Attorneys for Petitioner*
1200 Lewis Tower Building
Philadelphia, Pennsylvania 19102
(215) KI 6-4183

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NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, International Brotherhood of Electrical Workers, Local 367 (herein IBEW Local 367), respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on June 21, 1978.

## OPINIONS BELOW

The Court of Appeals entered a judgment order without opinion printed in Appendix A hereto, *infra* 1a, which is not yet officially reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board, printed in Appendix B hereto, *infra*, 5a-62a, are reported in 230 NLRB No. 12.

## JURISDICTION

The judgment order of the Court of Appeals granting enforcement of the order of the NLRB was entered on June 21, 1978. A timely petition for rehearing was denied on July 18, 1978 and the judgment order certified on July 26, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

## QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may ignore the findings of an Administrative Law Judge and provide a remedy for twenty-six persons for whom no findings of fact were made, no testimony introduced, no remedy suggested by the Administrative Law Judge, and about whom the Administrative Law Judge found no unfair labor practices to have been committed.

2. Whether the Board can conclude that the charging parties were entitled to be placed in referral for work groups as a remedy for the union's unfair labor practice when such referral



group placement required the Board to impose upon the parties, its own interpretations of the labor agreement that were at odds with the accepted interpretation given the collective bargaining agreement by the parties to that agreement.

3. Whether the Board erred in ordering as a remedy for the union's unfair labor practice the placement of the charging parties into referral for work groups without proof that the charging parties would have passed a certain qualifying test or whether the appropriate remedy was an order permitting the charging parties to take the test in question.

4. Whether the Board erred in not deferring to the arbitration process the charging parties' claims, which claims were cognizable under the contractual arbitration provisions.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended, 29 U.S.C. §151, *et seq.* (hereafter the "Act") are set out in Appendix C, *infra*, 63a-64a.

## STATEMENT OF THE CASE

On June 10, 1977 the National Labor Relations Board (Board) entered its order in the instant action finding the Union guilty of violating Section 8(b)(1)(A) of the National Labor Relations Act. The Board found that the Union, (1) failed to offer a certain inside wireman's examination to non-union job applicants and (2) improperly removed a Union member (Wilson) from the work referral list. The Board then ordered as

a remedy that all non-union persons who registered for work be placed in an appropriate referral group; that the charging parties be placed in specific referral groups; that Wilson be placed in a specific referral group; and that all the above receive back pay.

Local Union 367 International Brotherhood of Electrical Workers is an electrical construction local union which refers electricians for employment under three separate agreements covering three categories of work; (1) inside journeyman wiremen, (2) journeyman linemen, and (3) residential wiring (A705).[1] The skills necessary to perform linemen and residential wiring are less than those required of inside journeymen wiremen (A631).

Local 367, IBEW is a party to a Collective Bargaining Agreement with the Penn-Del-Jersey Chapter of the National Electrical Contractors Association (NECA) (A778). That agreement provides that the Union shall refer employees to the various member contractors of NECA (A787). The referral procedure established by agreement provides for certain categories of priority referred, Group I being the highest and most desirable and Group V being the lowest (65a-66a).

The Collective Bargaining Agreement provides:

> "*Section 4.* The Union shall maintain a register of applicants for employment established on the basis of the groups listed below. Each applicant

1. All parenthetical references to the record are to the printed appendix before the court below.



> for employment shall be registered in the highest priority group for which he qualifies.
>
> *GROUP I* — All applicants for employment who have four or more years' *experience in the trade,* are residents of the geographical area constituting the normal construction labor market, have passed a Journeyman's examination given by Local #367, IBEW or has been certified as a Journeyman Wireman by Local #367 Inside Joint Apprenticeship and Training Committee and who have been employed for a period of at least one year in the last four years under a collective bargaining agreement between the parties of this Agreement.
>
> *GROUP II* — All applicants for employment who have four or more year's *experience in the trade* and who have passed a Journeyman's examination given by a duly constituted Local Union of the IBEW or has been certified as a Journeyman Wireman by an Inside Joint Apprenticeship and Training Committee.
>
> *GROUP III* — All applicants for employment who have two (2) or more years' *experience in the trade,* are residents of the geographical area constituting the normal construction labor market and who have been employed for at least six (6) months in the last three (3) years *in the trade* under a collective bargaining agreement between the parties to this Agreement.

> *GROUP IV* — All applicants for employment who have worked *at the trade* for more than one (1) year." (Emphasis supplied.)

Both the language of the Collective Bargaining Agreement and the evidence adduced at the hearing established that the phrase "experience in the trade" means experience as an inside wireman (A30, 44, 78-79, 116, 705, 711-A, 714). Inside wireman experience is thus distinguished from other types of electricians' experience such as journeyman lineman, groundman or residential wireman (A705, 711-A, 714).

To justify the remedy of placing the charging parties in referral Group I, the Board took a contrary view of the meaning of the phrase "in the trade." The Administrative Law Judge stated:

> "The contract, however, does not define what the phrase 'experience at the trade' encompasses and it is reasonable to assume that it generally includes the full gamut of electrical skills in the trade and not, as the Respondent suggests in its brief, only inside Journeyman Wireman's experience" (16a-17a).

It is not unusual during periods of economic expansion for electricians from other local unions — or non-union employees — to seek referral from the Local 367 (A64, 91, 94, 127). These persons may be non-residents, or may hold classifications other than journeyman inside wireman (A64, 91, 94, 127).



Provided that the requisite eligibility exists — residence and work experience — persons seeking referral may move up in group by completing a journeyman wireman apprenticeship program or by taking a journeyman wireman's examination (A676).

In May of 1975 the local Union announced the date for such an examination (A8-9, 682). The examination was given on June 5, 1975. The examination was directed only to members of Local 367 who had previously taken the exam because there were no records of these members having taken the exam in the past (A73).

On September 26, 1975 the parties to the Collective Bargaining Agreement further set forth their joint interpretation of the contract that four or more years of experience at the trade meant such experience within the reasonable past (A705).

Wilson, who had experience "in the trade" and was a former Business Agent of the Union, had not worked "in the trade" for many years. Wilson's last experience as an inside journeyman wireman was in 1957 (A439, 699). The Board ignored the parties definition of work "in the trade" to find that Wilson qualified for a referral priority.

The parties to the Collective Bargaining Agreement established a grievance/arbitration mechanism for the resolution of disputes involving the interpretation of their agreement (A680, A681, the applicable clause is set out fully in Appendix D, *infra* 65a-66a). The Appeal Committee was composed of a member appointed by the employer, a member appointed by the

Union, and a public member chosen jointly by the employer and Union.[2] No charging party sought to invoke the arbitration process, challenge the Union's testing procedure or to determine the meaning of the phrase "in the trade."

On April 30, 1976 the Fourth Region of the NLRB caused to be issued a consolidated complaint against Local 367, IBEW. This complaint consisted of nine (9) separately filed charges (A665). In essence — except for the George Wilson charge — the complaint alleged that the eight charging parties were denied the opportunity to take the journeyman wireman's examination that might have qualified them to be in a higher priority referral group. (See paragraph 6(b) at A668.)

On June 11, 1976 the Regional Director issued an amendment to the complaint rewording paragraph 6(b) to add the names of two persons whom, it was alleged, did not take the examination along with "others" (A672).

The "others" referred to were 26 non-members who signed the Union's referral book during the period in question. These 26 were identified by the Union in response to General Counsel's subpoena (A702). No evidence was presented by General Counsel for the Board to show whether any of these persons:

— Were residents of the geographical area in question;

— Had any inside wireman's experience:

2. No allegations were ever made that the employer or public members to the panel were hostile to the charging parties.



— Worked under any Local 367/NECA Collective Bargaining Agreement; or

— Desired to take the examination.

On the other hand, evidence of eligibility to take the exam was adduced as to the charging parties, and as to two persons whose charges were withdrawn as untimely filed.

The Administrative Law Judge ordered that the eleven complaining persons who testified, be made whole for any loss of earnings occasioned by their being unable to take the June 1975 examination (51a). He also found no unfair labor practice to have been committed against other non-members and hence, directed no make whole remedy as to the individuals named in General Counsel's Exhibit 23 37a).

The NLRB adopted the Administrative Law Judge's findings of facts and conclusions, but enlarged the remedy ordering the respondent to make whole any non-member who registered for work in May and June of 1975 (58a).

## REASONS FOR GRANTING THE WRIT

### I.

**The decision of the court below leaves unanswered an issue of importance in the administration of the National Labor Relations Act left open by this Court in *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967).**

In *NLRB v. C & C Plywood Corp.*, 385 U.S. 421 (1967), this Court recognized the jurisdiction of the NLRB to proscribe conduct that is both an unfair labor practice *and*, arguably, a breach of the parties' Collective Bargaining Agreement. In so doing, stated this Court, the Board may also interpret the parties Collective Bargaining Agreement so far as is necessary to determine if, in the agreement the one party waived any of its rights under the statute. However, the Court stated specifically that the Board did not construe the labor agreement to determine the *extent* of the parties' rights. nor did it impose its own view of what the terms of the labor agreement should be, 385 U.S. at 428. Furthermore, the Court went to considerable length to point out that the agreement in *C & C Plywood Corp.*, was *not* subject to interpretation by arbitration (385 U.S. at 426).

Unlike *C & C Plywood Corp.*, the instant case does not involve a dispute between the parties who negotiated the labor contract, nor does the present case involve any issue as to the legality of any contract clause.



Again in *NLRB v. Strong*, 393 U.S. 357 (1969), this Court affirmed its decision in *C & C Plywood Corp.* but reiterated that the Board has no plenary power to administer and enforce a Collective Bargaining Agreement (393 U.S. at 360).

In the present case the Board went far beyond interpreting the labor agreement to determine if an unfair labor practice was committed. The Board, after finding that the Union committed an unfair labor practice by giving its test to union members only, ordered a remedy based upon its own view of what the labor contract meant and was intended to mean.

The Board "interpreted" the labor agreement to mean that experience in the trade meant any electrical experience. The Board ordered back pay based upon this "interpretation". The parties undisputed interpretation of their agreement was that "in the trade" meant as an inside journeyman wireman (as opposed to, for example, a residential wireman). Thus, instead of treating the charging parties uniformly with union members, the charging parties were advanced to positions based upon the NLRB's unilateral contract interpretation. This type of interpretation was condemned by the dissent in *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 36-37 (1967).

Similarly, the parties to the agreement construed Wilson's 1957 service as an inside wireman as too remote to justify his inclusion in a referral group, but to justify a remedial order the Board "interpreted" the labor agreement otherwise.

The petitioner submits that the NLRB has overreached the permissible limits of its statutory authority and that this Court's

decision in *NLRB v. C & C Plywood Corp., supra,* leaves undecided the scope of the Board's power to fashion a remedy based on its unilateral interpretation of a labor contract.

It is further submitted that the interpretation of the labor agreement must, as a matter of national labor policy, be left to the arbitration forum established by the parties.

It is further submitted that the interpretation of the labor agreement must, as a matter of national labor policy, be left to the arbitration forum established by the parties. *NLRB v. Strong,* 393 U.S. 357, 361 (1969); *Steelworkers Trilogy,* 363 U.S. 564 (1960).

## II.

**The decision of the court below is in conflict with the ruling of the Second Circuit Court of Appeals requiring proof that the charging parties' losses were proximately caused by the action of the Union.**

The decision of the court below has sanctioned the power of the National Labor Relations Board to impose a finding of unfair labor practices and a remedy favoring persons for whom no evidence was taken. Such a finding is contrary to this Court's holding in *Local 60, United Brotherhood of Carpenters and Joiners of America v. NLRB,* 365 U.S. 651 (1961); and the finding is contrary to the decision of the Second Circuit in *Local 138, International Union of Operating Engineers v. NLRB,* 321 F. 2d 130 (1963).



In *Local 60, Brotherhood of Carpenters and Joiners of America, supra,* the Court limited the power of the NLRB to fashioning those remedies that are proximately caused by the Union's conduct as proved at hearing.

In the instant case General Counsel produced no evidence that the 26 "other" persons were or could have qualified for work referral based on admittedly legitimate residence, experience or other factors.

In *Local 138, International Union of Operating Engineers v. NLRB, supra,* the Second Circuit rejected the NLRB's finding of blanket discrimination against a union in the operation of its hiring hall for lack of evidence. In so doing, the court also set aside the NLRB's remedial order as going "too far", and remanded to the Board for further findings.

Further, petitioner submits that the NLRB erred when, without comment or explanation it adopted the Administrative Law Judge's findings and conclusion, but modified the remedy to permit back pay for 26 persons about whom the Administrative Law Judge stated no unfair labor practices had been committed. Thus, not only did General Counsel fail to establish wrongdoing as to these 26 persons, *NLRB v. Patrick Plaza Dodge, Inc.,* 522 F. 2d 804, 807 (4th Cir. 1975); *NLRB v. Nashua Pre-Cast Corp.,* 475 F. 2d 765, 766 (1st Cir. 1973), but the Board failed to explain its rationale for finding an unfair labor practice where the Administrative Law Judge had found none, *Local No. 411, IBEW v. NLRB,* 510 F. 2d 1274, 1276 (D.C. Cir. 1975); *Greater Boston Television Corp. v. FCC,* 444 F. 2d 841, 853 (1970), *cert. denied,* 403 U.S. 923 (1971).

## CONCLUSION

For the foregoing reasons, International Brotherhood of Electrical Workers, Local 367, respectfully prays that this petition for a writ of certiorari be granted.

Respectfully submitted,

s/ Bernard N. Katz
s/ Bruce E. Endy

MERANZE, KATZ, SPEAR
& WILDERMAN
*Attorneys for Petitioner*



## APPENDIX A — JUDGMENT ORDER OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-2251

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 367, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondent,

(Board No. 4-CB-2632, etc.)

On Application for Enforcement of An Order of The National Labor Relations Board

Argued June 19, 1978
Before SEITZ, *Chief Judge,* ALDISERT and WEIS, *Circuit Judges.*

After consideration of all contentions raised by the petitioner and respondent, it is

*Appendix A*

ADJUDGED AND ORDERED that the Board's application for the enforcement of its order be and is hereby granted; and that the respondent's cross-application for vacation of the Board's order be denied.

Costs taxed against respondent.

Certified as a true copy and issued in lieu of a formal mandate on July 26, 1978.

Test:

s/ Frances R. Matysek
Acting Clerk, U.S. Court of Appeals for the Third Circuit

DATED: June 21, 1978

By the Court,

s/ Seitz
Chief Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn
Clerk



*Appendix A*

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 77-2251

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

LOCAL 367 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondent.

(Board No. 4-CB-2632, etc.)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH and HIGGINBOTHAM, *Circuit Judges.*

The petition for rehearing filed by

Respondent

*Appendix A*

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

s/ Seitz
Chief Judge

Dated: July 18, 1978



**APPENDIX B — DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD**

JD-109-77
Easton, PA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

LOCAL 367, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

and

GARY BILLCHECK, An Individual
Case 4-CB-2632-1

KENNETH POLLACK, An Individual
Case 4-CB-2632-2

WILLIAM P. RUSSELL, An Individual
Case 4-CB-2632-3

EDWARD C. MEYER, An Individual
Case 4-CB-2632-4

LAWRENCE V. KOHL, An Individual
Case 4-CB-2632-5

PATRICK J. NOLASCO, An Individual
Case 4-CB-2632-6

*Appendix B*

OLIN A. MAKLEY, An Individual
Case 4-CB-2632-7

PETER D. SCIASCIA, An Individual
Case 4-CB-2632-8

LOCAL 367, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

and

GEORGE J. WILSON, JR., An Individual
Case 4-CB-2642

*James Patrick Cullen, Esq.*, for the General Counsel.

*Shanley & Fisher*, by *Robert C. Neff, Esq.*, Newark, NJ, for the Respondent.

Statement of the Cases

PAUL BISGYER, Administrative Law Judge: These consolidated proceedings, with all the parties represented, were heard on July 6 through 8 and August 10 through 13, 1976, in Allentown, Pennsylvania, on the consolidated complaint of the General Counsel issued on April 30, 1976,[1] as subsequently

1. The consolidated complaint is based on separate charges filed in Cases 4-CB-2632-1, 2, 3 and 4 on November 18, 1975, copies of which were duly served on the Respondent by certified mail on November 20, 1975; on separate (Cont'd)



*Appendix B*

amended,[2] and the answer of Local 367, International Brotherhood of Electrical Workers, herein referred to as the Respondent or Local 367. In issue are the questions (1) whether the Respondent, as the operator of an exclusive referral system under its contract with electrical contractors, discriminatorily deprived nonmember job applicants of an opportunity to take an inside journeyman wireman's examination to satisfy one of the conditions for placement in priority referral Group I or II, and thus denied them employment opportunities not otherwise available to them in lower classifications, thereby violating Section 8(b)(1)(A) and (2) of the National Labor Relations Act

(Cont'd)

charges filed in Cases 4-CB-2632-5 and 6 on November 24, 1975, copies of which were duly served on the Respondent by certified mail on the same day; and on charges filed in Case 4-CB-2632-7 on November 25, 1975, in Case 4-CB-2632-8 on November 26, 1975, and in Case 4-CB-2642 on December 2, 1975, copies of which were duly served on the Respondent by certified mail on the respective filing dates.

2. On October 7, 1976, the undersigned denied a motion made by the amended consolidated complaint to allege the invalidity of certain clauses in the parties' collective-bargaining contract dealing with prior employment of job applicants under a collective-bargaining agreement between the parties as a condition for placement in specific referral groups. The Order and papers on which the Order is based were made part of the record in this case as Administrative Law Judge's Exhibit 1. Subsequently, on January 31, 1977, the Board issued its decisions in *Interstate Electric Company*, 227 NLRB No. 291, and *Local Union No. 68, International Brotherhood of Electrical Workers (Howard Electric Company)*, 227 NLRB No. 278, upholding the validity of similar clauses as those challenged in the General Counsel's denied motion.

as amended[3] and (2) whether the Respondent violated the same sections of the Act by evicting George J. Wilson, a former member and business manager, from its hiring hall, changing his Group II classification to "None" and barring him from using its exclusive hiring hall facilities because of his opposition to the Respondent's incumbent officials and their administration of union affairs. At the close of the hearing, the parties waived oral argument but subsequently filed briefs in support of their respective positions.

Upon the entire record and from my observation of the demeanor of the witnesses, and with due consideration being

3. Section 8(b)(1)(A), in relevant part, makes it an unfair labor practice for a labor organization or its agents "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7 . . . . " Section 7 provides that:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Section 8(b)(2) makes it an unfair labor practice for a labor organization or its agents, among other things, "to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . . " The latter provision prohibits an employer "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . . "



given to the arguments advanced by the parties, I make the following:

## Findings and Conclusions

### I. The Business of the Companies Involved

Penn-Del-Jersey Chapter of the National Electrical Contractors Association, herein called NECA, is a Pennsylvania corporation with its principal place of business in Philadelphia, Pennsylvania. It is an employer association whose members are engaged in the construction business in Delaware, New Jersey and Pennsylvania. NECA exists for the purpose, among others, of representing its employer-members in the negotiation of collective-bargaining agreements with labor organizations, including the Respondent. During the past year, NECA's members received more than $50,000 for services performed across state lines.

It is conceded, and I find, that NECA and its members are and have been at all material times employers engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

### II. The Labor Organization Involved

It is undisputed that the Respondent is a labor organization within the meaning of Section 2(5) of the Act.

*Appendix B*

## III. The Alleged Unfair Labor Practices

### A. The Evidence

#### 1. The Respondent's exclusive hiring hall; the issues involving its administration

For more than 15 years, the Respondent, which is predominately a wireman's local union, and NECA have been parties to successive collective-bargaining contracts pursuant to which the Respondent has operated a hiring hall for the exclusive referral of inside journeymen wiremen[4] to projects in the Pennsylvania, New Jersey and Delaware area undertaken by NECA's employer-members. The parties' contract in effect at the time of the events herein, and which apparently is still current, is for a term beginning July 1, 1974 through June 30, 1976 and yearly thereafter absent notification to amend. This contract recognizes the Respondent as "the sole and exclusive source of referral of applicants for employment . . . without discrimination against such applicants by reason of membership or non-membership in the Union. . . ." acknowledging the right of the employer to reject any applicant for employment, Section 4 of the contract provides for the Union to "maintain a register of applicants for employment — on the basis of the groups listed

4. The Respondent also has contracts for the exclusive referral of journeymen linemen and residential wiremen not here involved. Although it appears that the work of inside journeymen wiremen requires higher skills than that of lineman or residential wireman, the record does not contain sufficient detail to differentiate between the skills used in each classification.



*Appendix B*

below" and for the registration of each applicant "in the highest group for which he qualifies":

> GROUP I — All Applicants for employment who have four or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a Journeyman's examination given by Local #367, I.B.E.W. or has been certified as a Journeyman Wireman by Local #367 Inside Joint Apprenticeship and Training Committee and who have been employed for a period of at least one year in the last four years under a collective bargaining agreement between the parties of this Agreement.
>
> GROUP II — All applicants for employment who have four or more years' experience in the trade and who have passed a Journeyman's examination given by a duly constituted Local Union of the I.B.E.W. or has been certified as a Journeyman Wireman by any Inside Joint Apprenticeship and Training Committee.
>
> GROUP III — All applicants for employment who have two (2) or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market and who have been

employed for at least six (6) months in the last three (3) years in the trade under a collective bargaining agreement between the parties to this Agreement.

GROUP IV — All applicants for employment who have worked at the trade for more than one (1) year.

Referrals are made from the highest group first, that is Group I, in the order of the applicant's place on the out-of-work list until the list is exhausted in which event referral is made from the next succeeding group until all the groups are exhausted. To implement the operation of the hiring hall, the Respondent maintains a bound ledger for each group classification for inside journeyman wireman[5] which must be signed weekly by an out-of-work applicant to be eligible for referral.[6] Section 8 of the contract contains a provision for the establishment of an "Appeals Committee . . . composed of one member appointed by the Employer, one member appointed by the Local Union, and a Public Member appointed by both these members, . . ." The Committee's function is "to consider any complaint of any

5. A separate ledger is kept for journeymen linemen.

6. There is testimony that several years ago some individuals were referred to jobs without signing a referral book. There is also testimony that on infrequent occasions when both the business manager and assistant business manager are absent from the hiring hall, job applicants sign a yellow pad, from which their names are subsequently transferred to the appropriate ledger.





employee or applicant for employment arising out of the administration by the Local Union of Section 6.3 to 6.7 of this Agreement."[7] The contract further empowers the Appeals Committee "to make a final decision on any such complaint which shall be complied with by the Local Union." The rules and regulations concerning the operation of the referral system are posted on bulletin boards in the hiring hall.

As will be fully discussed below, on June 7, 1975, the Respondent gave an inside journeyman wireman's examination only to its members to enable them to qualify for priority referral in Group I or II. The amended consolidated complaint alleges that the Respondent since the end of May 1975, or the beginning of June 1975, unlawfully "failed and refused to allow, and denied an opportunity to, non-members of Respondent to take an examination which would have placed them in a higher priority group for purposes of employment pursuant to the contract" and "thereby denied [11 named nonmembers and other nonmembers] employment opportunities pursuant to the contract. . . ."[8] These allegations thus pose two distinct

7. The reference to "Section 6.3 to 6.7" relates to the numbering of the provisions used in the parties' earlier contracts. In the current contract, the sections in question should have been designated Article VI, Sections 3 to 7, to conform with the adopted revised numbering system.

8. Originally named in the consolidated complaint were the charging parties Gary Billcheck, Kenneth Pollack, William P. Russell, Edward C. Meyer, Lawrence V. Kohl, Patrick J. Nolasco, Glin A. Makley, and Peter D. Sciascia. By written amendment to the consolidated complaint, Carl Phillips, Samuel Strunk "and others registered in or seeking employment through

(Cont'd)

questions (1) whether the Respondent discriminatorily deprived job applicants of the right to take the examination mandated in the collective-bargaining agreement in order to meet one of the qualifications for placement in priority referral Group I or II because they were not members of Local 367, and (2) if so, whether they were also thereby discriminatorily denied placement in those groups for priority referral not otherwise available to them in the lower group they then occupied. Manifestly, the latter question presupposes the complainants' compliance with the other conditions for inclusion in Group I or II. The Respondent defends on various grounds, among others, that no discriminatory treatment was proved and that, in any event, the complainants have failed to resort to the contractual appeals procedure or to exhaust the internal union remedies to resolve their complaints regarding the operation of the hiring hall as it affected them.

Another question to be considered is whether the Respondent's eviction of Wilson from the hiring hall, his declassification from Group II to "None," and the denial of use

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Respondent's hiring hall in May and June 1975, non-members of Respondent" were added by the Regional Director. During the hearing an eleventh individual, Alfred L. Wright, was included as a victim of discrimination on motion of the General Counsel over the Respondent's objection. The "others" mentioned in the amended consolidated complaint were 26 individuals subsequently named in General Counsel's Exhibit 23 whom the Respondent identified as nonmembers who had registered with it for the purpose of obtaining employment between May 1 and July 1, 1975.



of its referral facilities to him were unlawful measures taken in reprisal for Wilson's opposition to Business Manager Cuvo and Union President and Assistant Business Manager Benner and their administration of union affairs, as the General Counsel contends, or whether its treatment of Wilson was justified by legitimate reasons, as the Respondent argues. Here, too, the Respondent urges, as a defense, that the pertinent allegations of the consolidated complaint should be dismissed on account of Wilson's failure to submit his grievance to the Appeals Committee or to the internal union procedures for adjustment. We turn to the evidence.

2. The Respondent's notification to members only of the scheduled June 7, 1975 journeyman's examination

It appears that during 1973 and the first half of 1974 or so the Respondent had sufficient inside journeyman wireman's work for both its members and nonmembers, including the 11 named complainants[9] who utilized the hiring hall to obtain such employment. However, in the latter part of 1974, the effects of the recession in the building construction industry began to be

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9. Billcheck, Russell, Meyer, Makley, Phillips, Strunk and Wright were members of a sister Local 1319, essentially a linesman local. For this reason they were classified by their union as linesmen, although they were experienced inside journeymen wiremen who sought work of that nature and were actually referred by the Respondent to such jobs which, as previously indicated, required higher electrical skills than lineman work. The other four complainants, Pollack, Kohl, Nolasco and Sciascia had no union affiliation. They also had inside journeyman wireman experience and were referred by the Respondent to jobs requiring those skills.

felt in the Respondent's hiring hall, causing a scarcity of jobs and unemployment among the Respondent's members, as well as others. In fact, there is testimony, virtually uncontradicted and which I credit, that in October 1974 Business Manager Cuvo, President and Assistant Business Manager Benner and another union officer, Carl Snyder, suggested to several complainants and other nonmembers that they take a volúntary layoff from the United Engineers' Martin's Creek Powerhouse project, to which they had previously been referred and on which they were then working, to make room for unemployed members.

Because of the limited number of available jobs, it is obvious that it would be to an applicant's decided advantage, if he were included in a priority referral group. As noted above, the hiring hall provisions of the governing collective-bargaining contract required, among other things, than an applicant pass "a Journeyman's examination" given by the Respondent Local 367 to be eligible for placement in Group I or that he pass "a Journeyman's examination given by a duly constituted Local Union of the I.B.E.W." to be eligible for placement in Group II. To qualify to take the examination, which the Respondent is obligated to schedule once every 6 months, the contract requires that the applicant have "four (4) years' experience at the trade."[10] The contract, however, does not define what the phrase

10. This requirement is found in the "Definitions" part of Article VI, Section 4, and reads as follows:

> The term "Examination given by Local Union No. 367" as referred to in Group I, shall include experience rating tests if such examination shall have been given prior to May 1, 1959, but from and afrer May 1, 1959, shall include only written and/or practical examination. Examinations for journeymen given by Local No. 367 shall take place once every six months. An applicant shall be eligible for examination if he has four (4) years' experience at the trade.

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"experience at the trade" encompasses and it is reasonable to assume that it generally includes the full gamut of electrical skills in the trade and not, as the Respondent suggests in its brief, only inside journeyman wireman's experience.

In May 1975,[11] Cuvo sent a letter solely to the Respondent's members, stating, in pertinent part, as follows:

> To: All Members of I.B.E.W. Local 367
>
> * * *
>
> Local 367 Examining Board will give an Inside Journeyman Wireman's Examination at 9:30 A.M. on Saturday, June 7th, 1975 at 32 North Second St., Easton, Pa. for any of *our* members *wanting* to take it. This examination is *not* mandatory; however, we cannot place some of our own members in Group I or II because they

11. Unless otherwise indicated, all dates hereinafter mentioned relate to 1975.

do not have any record of examination in their files. Also, some other Locals require "proof of examination." You can find out your status, if you don't know, by calling this office. We do have documentation that all former members of Local 28, Baltimore, have taken a Journeyman's Examination. Also, all members who have completed the J.A.T.C. course in the past five years, in this Local, do not require an examination.

* * *

As you may or may not know, over one million, seventeen thousand union building tradesmen are presently unemployed, and this figure is climbing. We have called locals from Florida to Alaska seeking work for our unemployed, with very little success.

This letter was posted on a bulletin board in the hiring hall and soon the notification of the schedules examination became the subject of discussion among the complainants and other nonmember and member job applicants. Manifestly, — and no claim is made to the contrary — the examination was not open to any nonmember whether or not he was then registered for work or was otherwise seeking employment through the



Respondent's hiring hall,[12] even though the contract expressly prohibits discrimination based on union or nonunion membership in the administration of the referral system.[13] Moreover, not only is there no evidence that any nonmembers were informed that they could take the examination, but it is quite clear that it would have been futile for the complainants or other nonmembers to request and secure permission to take the examination. Indeed, the record contains testimony, much of which is uncontroverted, of inquiries and requests made by several complainants of Cuvo, Benner and other union officials to take the examination only to be informed what was already apparent that the examination was restricted to members and denied to outsiders because too many members were unemployed.[14] One of the complainants, Pollack, who received

12. It appears that in May or June complainants Russell, Meyer, Nolasco, Makley and Wright had registered in the out-of-work books, while the other complainants evidently saw no need at the time to register because of the lack of available work, although they visited the hiring hall during that time period.

13. To gain entrance to the examination room, applicants were required to exhibit Local 367 dues receipts issued by the Respondent.

14. The only testimony that was contradicted was that given by Pollack concerning his conversation with Cuvo, who denied that the conversation ever occurred. I credit Pollack's account which I find plausible and in conformity with the realities of the situation.

The Respondent also questions the veracity of Makley's testimony that he had asked Benner for permission to take the June 7, 1975 examination to upgrade his standing, by alluding to Makley's statement in a letter sent to a Board Agent after November 26, 1975. In this letter, Makley wrote that "I just

(Cont'd)

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from Cuvo this negative response to his request to take the examination, promptly conveyed this information to other complainants who were present in the hiring hall at the time.

In contrast with the treatment accorded nonmembers, there is uncontroverted and credited testimony by Robert Vesey, a long-time member of Respondent Local 367, that, after receiving the above-quoted notification of examination, he was upset that he was obliged to take the examination and spoke to Cuvo about it a week before the scheduled date. Cuvo assured Vesey that he had nothing to worry about and showed him the examination which was to be given on June 7. After reading it, Vesey remarked to Cuvo that "any idiot" could pass it and telephoned several friends to advise them to make sure that they

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learned of the journeyman's examination approximately three weeks ago when I saw a copy of the letter sent to Local 367 men which George Wilson had, and am enclosing a copy to you." However, in the next paragraph he stated:

> I asked several months ago about taking the J. A. C. T. test which would upgrade me to a different and higher level.
>
> I was told by Russel (sic) Benner I couldn't take the test because I was from an outside Local.

Confirming his conversation with Benner, Makley testified that he mistakenly believed when he wrote the letter that the June 7 examination the Respondent had scheduled was a J.A.C.T. (apprenticeship) test and that he did request Benner for permission to take that examination but that he was turned down because he was from an outside Local. I credit Makley's explanation and undisputed testimony and find no inconsistency or falsification, as the Respondent asserts.



*Appendix B*

took the examination. As anticipated, Vesey subsequently passed the examination and was placed in Group I as a qualified inside journeyman wireman. Another member of the Respondent for 17 years, Paul F. Seidt, credibly testified, without contradiction, that a week before the June 7 date of the examination, Benner telephoned him to remind him to take the examination. Seidt agreed to do so and passed the examination, which he, too, thought was simple. As a consequence, he was advanced from Group III to Group I status.

On June 7,[15] a written examination was given by the Respondent to 103 members. The examination paper was entitled "INSIDE WIREMAN — PRACTICAL EXAMINATION" with the following introductory sentence: "Any member of Local 367 — who has been working as an Inside Journeyman for at least eight (8) years shall be eligible to take this examination." The test consisted of 10 questions, of which the first question was an introductory inquiry and the next three and the tenth questions were union oriented.[16] All 103

15. Cuvo originally testified that he thought that the examination was held on July 5, 1975. However, he subsequently corrected his testimony upon learning that the true date was June 7, 1975. I have no reason to believe that Cuvo wilfully gave false testimony concerning the date of the examination.

16. These questions were:

> 1. How many years have you been working at the electrical construc'tion trade?
>
> 2. How many years have you been in the I.B.E.W.?

(Cont'd)

members passed the examination and were certified as having successfully passed an "Inside Journeyman Wireman Examination." According to the minutes of a July 11 membership meeting of Local 367, Cuvo reported the results of the June 7 examination and that 87 of the 103 members moved from Group III to Group II and 16 moved from Group II to Group I.

It is clear that the contract's eligibility requirement to take the examination is "four (4) years' experience at the trade" and not 8 years as stated on the examination paper. As discussed *infra*, I find that the 11 named complainants satisfied the contract requirement and were therefore qualified to take the examination. As for the other 26 nonmembers who had registered for referral in May or June and are identified in General Counsel's Exhibit 23, no evidence was adduced at the hearing to establish their eligibility to take the examination.

3. Complainants' qualifications for placement in Group I or II

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3. Which I.B.E.W. Locals have you worked out of (to the best of your recollection)?

4. Name one or more I.B.E.W. Business Managers for reference (active).

* * *

10. Why is being in the I.B.E.W. a benefit to the working electrician?





In addition to passing the examination as one of the conditions for inclusion in Group I, the collective-bargaining contract requires that an applicant have "four or more years' experience in the trade"; residency in "the geographical area constituting the normal construction labor market," as therein specifically described; and employment for "at least one year in the last four years under a collective bargaining agreement between the parties of this Agreement." For eligibility in Group II, the contract requires the same "four or more years' experience in the trade," as well as passing an examination given by any IBEW local union.

At the outset, it is noted that the Respondent does not question the complainants' compliance with the residency requirement for placement in Group I. In any event, the record supports such a finding. As for the 4 or more years' experience in the electrical trade, the Respondent also does not dispute the testimony of complainants Billcheck, Russell, Meyer, Makley, Phillips and Strunk, which I also find establishes that their electrical experience, which includes inside wireman's work, meets this requirement. However, the Respondent contends that the evidence relating to the electrical experience of the other five complainants falls short of the 4 years needed to qualify for placement in Group I or II. We consider each of these individuals separately.

*Pollack* testified, without contradiction, to a work record of 17 years in a variety of electrical jobs. This encompassed inside journeyman wireman's jobs among which was the Martin's Creek Powerhouse job he had obtained through the

Respondent's hiring hall and where he had worked for 17 months until October 1974. *Nolasco* credibly testified that he performed full time electrical work for an employer in the electrical trade from 1963 to 1968; private electrical jobs "on the side" from 1968 to 1973; and from 1973 through 1974 when he worked for various electrical contractors on referral from the Respondent's hiring hall. He further testified that this experience included inside journeyman wireman's work. According to *Sciascia's* undisputed and credible testimony, he was employed as an electrician by different contractors for about 15 years. From 1972 to 1975, he was referred to various jobs through the Respondent's hiring hall. His experience included inside journeyman wireman's work. *Wright's* credible testimony shows that he was an electrician for 11 years with inside journeyman experience. He, too, has received such wireman's jobs on referral through the Respondent's hiring hall since November 1972. Lastly, although *Kohl* appeared to be a confused and at times an incoherent and difficult witness to comprehend, the record sufficiently demonstrates that he possessed more than 4 years' experience in the electrical trade, a part of which he acquired through referral from the Respondent's hiring hall. In fact, in 1974, the Respondent permitted him to take an inside journeyman wireman test which, as indicated, required 4 years' electrical experience. However, he failed the test, according to Kohl, because of inadequate preparation. Without going into further detail, which appears to me to be unnecessary, I find, in sum, that the five above-named individuals, as well as the six other complainants whose electrical experience is not contested, satisfy the contractual requirement of "four or more years' experience in the trade" for placement in Group I or II.





With respect to the additional Group I requirement of employment of "at least one year in the last four" under a bargaining agreement between the parties, the Respondent only argues that Wright, Sciascia and Kohl do not meet this condition. However, the Respondent's own record of Wright's employment disclosed that since November 1972 he has been referred by the Respondent to jobs governed by its bargaining agreement with contractors for whom he worked much longer than one year. The undisputed evidence also establishes that Sciascia, on referral from the Respondent's hiring hall, worked at least one year on jobs covered by the Respondent's bargaining contract. As for Kohl, on the other hand, his employment card produced as an exhibit by the Respondent discloses that Kohl was referred to jobs governed by the contract but that such employment totalled approximately 7 months.[17]

Finally, the Respondent concedes that since June none of the 11 complainants has been referred to any job through its hiring hall.

4. Wilson's registration for referral; his subsequent declassification from Group II to "None"; and denial of access to and use of the hiring hall

George J. Wilson, Jr., served as the Respondent's business

17. These jobs were Sargent Electric from February 28 to May 17, 1974, and United Engineering from May 28 to October 2, 1974. While Kohl's employment does not meet a condition for Group I placement, it does satisfy the 6 months in the last 3 years requirement for Group III placement.

manager for something less than 10 years until 1966 when he resigned from the position and his union membership which dated back to 1945. In 1968, his membership was restored but terminated the following year for nonpayment of dues.

There is no evidence of any contact between Wilson and the Respondent until the Spring of 1974 when Wilson telephoned Union President and Assistant Business Manager Benner. Wilson made various inquiries of Benner concerning the former's contemplated employment with Blasco Electric Company and whether he would be permitted to perform wiring work on Blasco's McDonald Restaurant job as a journeyman wireman or foreman. When Benner indicated that Wilson would probably first have to register for referral, Wilson raised the subject of his contemplated appointment as Blasco's superintendent. Wilson then asked whether he could work with tools of the trade as a partner of the firm. The conversation ended with nothing conclusive being decided.[18] Wilson thereafter continued his association with Blasco as superintendent for several months when it was terminated, according to Wilson, because of certain suspected pressures put on Blasco which Wilson apparently attributed to Respondent's Business Manager Cuvo and Benner. Wilson testified he was therefore determined "to get even" with Cuvo and Benner.

In early Spring of 1975, Wilson called Cuvo on the

18. The foregoing statement essentially reflects Benner's credited testimony which I find was more detailed and accurate than Wilson's brief account.



telephone to arrange a meeting to have a discussion with him regarding a matter not otherwise identified. Cuvo abruptly hung up, saying that he was too busy running the union. Not long after this aborted conversation, Wilson met Benner in the Post Office Building in Easton, Pennsylvania, and told him that he would do everything he possibly could do to see that both Cuvo and Benner were replaced at the next union election.

On September 4, Wilson appeared at the Respondent's hiring hall where he secured a membership application form from Benner. Wilson completed the form which he returned to Benner. At a union meeting held on September 8, Wilson's application was brought up but no action was taken on it as a result of Cuvo's objection. It appears that Wilson had not pursued proper procedures for readmission to the Union.

On September 5, Wilson went to the Respondent's hiring hall to register for employment. Benner handed Wilson an out-of-work book to sign which Wilson did, commenting that he assumed that the book was for Group II referral. At the hearing, Cuvo admitted that Wilson was placed in Group II when he first registered for wireman's work. The record further establishes that Wilson has been an electrician for approximately 20 years, having passed an inside journeyman wireman's examination in 1949.[19] Like other job applications, Wilson remained in the hall until its regular 9 a.m. closing time, without receiving a referral.

19. Specifically, the evidence shows that Wilson worked in the electrical trade from 1940 to 1957, except for 4-3/4 years when he was in the military service; that he was the Respondent's business manager from 1957 to 1966; that

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Wilson continued to visit the hiring hall on the morning of September 8, 9 and 10 in his unsuccessful search for a job. On the latter date (September 10), Wilson was evicted from the hall under the following circumstances: While in the hall, Wilson joined several individuals at the registration desk. At that time, Wilson's brother, Thomas, asked Benner what his standing on the out-of-work list was. At that point, Cuvo appeared, inquiring what was going on. Benner told Cuvo of Thomas Wilson's request. Cuvo then looked through the referral book and advised Thomas Wilson what his position was. Thereupon, George Wilson asked for his standing on the list. Cuvo replied that he could not tell him. Wilson then inquired, "You mean, you can't or you won't?" Cuvo responded, "Both," and noted that Wilson was not a member. Commenting that this would not go well with the NLRB, Wilson shouted a not uncommon

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he was engaged in his own business as an electrical contractor and general contractor from 1969 through 1973, working with the tools of the electrical trade; that he was employed by Blasco Electric Company as electrical superintendent for 3 or 4 months in 1974, supervising an electrician on the job but not working with tools himself; and that he was self-employed between January 1, 1975 and September 30, 1975, during which period he performed the necessary journeyman wireman's work on various residences, along with other nonelectrical jobs. Wilson also testified that he satisfied all the requirements for inclusion in referral Groups I through IV except that he had not worked 1 year in the last 4 years under the Respondent's contract with contractors entitling him to Group I eligibility, or 6 months in the last 3 years which is needed for eligibility in Group III. In evidence is also a letter issued by the Respondent under date of August 7, 1968 that its "records indicate that on June 30, 1949, George J. Wilson, Jr. passed an examination given before the Examining Board of I.B.E.W., Local Union No. 367."





obscenity[20] at Cuvo who ordered Wilson to leave the hall or he would call the police. Wilson thereupon left the hall as Cuvo proceeded to his office to call the police who arrived a few minutes later and cleared the hall. Cuvo testified that it was Wilson's obscene remark that caused him to evict Wilson.[21]

Notwithstanding his eviction, Wilson visited the hiring hall in the ensuing days either staying inside the hall for a short while or loitering on the street. During these times, he engaged members in conversation in which he complained about being discriminated against.

On September 22, Wilson appeared at the hiring hall to register.[22] Benner handed him a form entitled "Application For Referral As Construction Electrician." Wilson filled out and dated the form and returned it to Benner. In it, Wilson stated that he had 25 years experience as "inside wireman" and under

20. Cuvo testified that his female secretary was within hearing distance. However, he conceded that he heard the same expression in the hiring hall before but it was not in such a loud voice.

On the basis of this incident Cuvo subsequently filed a complaint in a local magistrate's court against Wilson, alleging harassment. The complaint was dismissed after a trial held on October 30.

21. However, in his testimony in the magistrate's court Cuvo stated, in effect, that, if Wilson were a member, he could not evict him. The General Counsel alludes to this testimony as an admission of disparate treatment.

22. To remain on the out-of-work list job applicants have been required to renew their registration weekly.

the item "Former Employers" he wrote "H.N. Crowder, Jr. Co., IBEW 367, 1946-1968."[23] Later in the day, and out of the presence of Wilson, Cuvo noted the word "None" in the section of Wilson's completed form entitled "Classification" opposite a vertical listing of Group I through V. In addition, Cuvo wrote under "Comments" his reason for giving Wilson a "None" classification, as follows:

> Applicant is not considered an inside journeyman wireman. To the best of my knowledge, he has not worked as a construction electrician for a period of over *18* years. The fact that he passed a written examination (or claims to have) over 26 years ago does not qualify him as a job applicant in this hiring hall. A.A.C.

Cuvo testified that he acted unilaterally in thus changing Wilson's classification from Group II in which he had previously been placed to "None," for the reason that he (Cuvo) had "determined that . . . [Wilson] did not meet the minimum requirements for the lowest priority group (Group IV) because he had not worked at the trade for more than one year *within the last four years.*"[24] (Emphasis added.) However, Cuvo

23. Although the form states that "You must show proof of the above statements," there is no evidence that Benner, Cuvo or any other union official requested it.

24. This quoted statement, confirmed as true by Cuvo on the witness stand, is taken from his affidavit given to a Board Agent.



conceded that there is nothing in the contract that imposes this requirement for Group IV eligibility. He, nevertheless, justifies his injection of the new condition of employment in the trade of more than 1 year in the *last 4 years* by the fact that at a meeting of the Labor-Management Committee[25] subsequently held on September 26, the Committee concurred in his interpretation of the requirement in question.[26] According to Cuvo, who was one of the Respondent's representatives on the Committee, he was prompted to submit this interpretation to the Committee for approval because of the Wilson matter.

25. Article I of the Respondent-NECA Agreement provides for the establishment of a Labor-Management Committee, consisting of three union representatives and three employer representatives, to consider "[a]ll questions or disputes which are not adjusted between the Union and the Employer."

26. The minutes of this Committee meeting, in relevant part, read, as follows:

> In accordance with Article I of the collective bargaining agreement . . . the following interpretations were unanimously agreed to, following much discussion:
>
> • • •
>
> " . . . [*W*]*ho have worked at the trade for more than one (1) year*" shall be construed to mean that this requirement shall have been met within the reasonable past. Reasonable past shall mean that no more than four (4) years have elapsed since the applicant has fulfilled this requirement. (re: Group IV)

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Concerning Cuvo's revocation of Wilson's Group II classification, the only evidence of the reason consists of Cuvo's above-quoted notation made on Wilson's September 22 application and Cuvo's testimony that Wilson was removed from the Group II classification between September 15 and 24. However, it further appears from the minutes of the Labor-Management Committee's September 26 meeting that the Committee also adopted an interpretation retroactively supporting Cuvo's revocation of Wilson's Group II status. [27]

On September 23, Wilson again came to the hall. Benner promptly informed him that, on Cuvo's orders, he was barred from the hall and that if he did not leave he would be arrested. Whereupon Wilson departed. However, Wilson returned the next day accompanied by another applicant to witness Wilson's anticipated ejection. As expected, Benner directed Wilson to leave, which he did.

On September 25 or 26, Wilson received the following letter dated September 24 from Cuvo, as the Respondent's business manager and financial secretary:

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27. Thus, concerning the interpretation of the relevant language of Group II, the Committee minutes read:

> *"four or more years experience in the trade"* shall be construed to mean that this experience shall have been in the reasonable past. Reasonable past shall mean that no more than four (4) years have elapsed since the applicant has fulfilled the requirement. (re: Group II)



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> This letter is to officially advise you that you are barred from this Local Union's Hiring Hall.
>
> You were advised of this verbally by my assistant yesterday, September 23, 1975 and again this morning.
>
> He stated to you, under my direction, that this action has *nothing* to do with your status as a member or non-member. This is a *fact.*
>
> This property (32 North Second Street, Easton, Pa.) is private property, and we reserve the right to refuse admission to these premises to anyone that we so choose.
>
> If you enter these premises again, after receipt of this notice, we will file a complaint of trespassing against you.

Despite this notification that his presence was not welcome at the hiring hall, Wilson subsequently sought to register for work at the hall but without success. There is no evidence whether Wilson thereafter has persisted in these efforts.

There can be no doubt of the bitter feelings and hostility which have existed between Wilson, on the one hand, and Cuvo and Benner on the other, for some time before the September events previously described. Wilson had warned Benner that he would exert his energies to see that he and Cuvo were defeated

at the next union election. He had also prepared a resolution for members to submit at a union meeting to provide for the discontinuance of Benner's salary as assistant business manager. During the early part of the week of September 8, in the union hall Wilson called Benner an "idiot" in the presence of other job applicants. On another occasion during the same time period, Wilson disparaged Benner by telling the men in the hall that Benner was simply an overpaid clerk. It is also clear that Wilson has repeatedly and openly voiced to members and nonmembers his criticism of the way the hiring hall and union affairs were being managed by Cuvo and Benner. Indeed, Cuvo in his affidavit given to the Board asserted that "[s]ince on or about September 4, 1975, Mr. Wilson has continually attempted to inject himself into the hiring hall to impede and harass the union officials and staff in the performance of their duties." Whether Wilson's vocal opposition to the incumbent union officials was the motivating reason for his eviction, declassification and denial of the use of the Respondent's referral facilities will be considered in the Concluding Findings section of my Decision.[28]

28. Whether or not the complainants and Wilson were completely candid in their testimony concerning their knowledge of the appeals procedure for remedying complaints regarding the administration of the hiring hall or concerning the assistance Wilson furnished the complainants respecting the filing of the unfair labor practice charges herein, does not affect the foregoing factual presentation which is based on virtually uncontradicted and credible testimony or which is otherwise compelled by the evidence in the record.





B. Concluding Findings

With respect to discrimination against the 11 named complainants[29]

It is settled law that a union which undertakes to operate an exclusive hiring hall pursuant to a contract or other arrangement with employers as the exclusive source of recruitment of employees is obligated to treat applicants equally and to refer them to jobs without regard to their union membership or loyalty or the lack of it. If the union fails to observe this obligation and administers the hiring hall in a discriminatory manner it clearly violates Section 8(b)(2) and (1)(A) of the Act.[30] As shown above, this is precisely what the Respondent did when it solicited and permitted *only* its members to take the inside journeyman wireman's examination, mandated by the contract, to enable them to qualify for Group I or II priority referral status, while simultaneously depriving nonmembers similarly using the Respondent's hiring hall to the right to take the examination to improve their job opportunities. The specific victims of this disparate treatment where the 11 complainants who, despite the fact that they satisfied the only contractual prerequisite of 4 years experience in the trade for taking the

29. Billcheck, Pollack, Russell, Meyer, Kohl, Nolasco, Makley, Sciascia, Phillips, Strunk and Wright.

30. *Local 357, International Brotherhood of Teamsters (Los Angeles-Seattle Motor Express) v. N.L.R.B.*, 365 U.S. 667; *Local Union 136, Muskingum Valley District Council (Frank Vlack Co.)*, 165 NLRB 1040, 1041.

examination, and despite the contract's explicit prohibition against discrimination based on union membership, were not permitted to take the examination.[31] Thus, by restricting the examination solely to its members, the Respondent, not only accorded members preference in referral opportunities, but prevented the complainants from fulfilling one of the conditions for placement in priority Group I or II where similar referral prospects would have been available to them.

In short, I find that, by denying the 11 complainants of the right to take the wireman's examination because they were not members of its Local Union, the Respondent, in violation of Section 8(b)(2) of the Act, attempted to cause and caused the contracting employers to discriminate against them to encourage membership in its labor organization in violation of Section 8(a)(3) of the Act. I further find that such conduct amounted to restraint and coercion of employees in the exercise of their statutory rights violative of Section 8(b)(1)(A) of the act.[32]

31. As indicated previously, during the May-June period when the examination was announced and administered, five of the complainants had registered for work; others saw no need to sign the referral book when they visited the hiring hall because of the job shortage and the limited possibility of securing employment; and a number of complainants, to the knowledge of other complainants, unsuccessfully tried to obtain permission from officials of the Respondent to take the examination.

32. *Local Union No. 269, International Brotherhood of Electrical Workers (Mercer County Division, New Jersey Chapter, National Electrical Contractors Association),* 149 NLRB 768, enfd. 357 F. 2d 51 (C.A. 3); *Nassau-Suffolk Chapter of the National Electrical Contractors' Association, Inc.,* 215 NLRB 894.



However, I find that no unfair labor practices were committed against the 26 other nonmembers included in General Counsel's Exhibit 23 as no evidence was adduced by the General Counsel that those individuals were eligible under the contract to take the examination. Accordingly, the relevant allegations of the amended consolidated complaint respecting these 26 nonmembers will be dismissed.

Apart from the unlawful discrimination inherent in the Respondent's failure to make the examination available to the complainants, I find that the Respondent's conduct also deprived the named complainants of the opportunity to achieve Group I or II status for priority referral. It has previously been found that all the complainants, except Kohl, met the contract requirements of 4 years experience in the trade,[33] residency, and at least 1 year in the last 4 years of employment in jobs covered by the parties' collective-bargaining agreement, for placement in Group I. Kohl, however, did not possess the 1 year in the last 4 years of employment under the parties' contract, although he did have 4 years experience in the trade required for Group II status.

33. The Respondent states in its brief that the required 4 years experience must have been gained as a journeyman wireman. Apart from the fact that the record does not describe the particular skills encompassed in wireman's work, except that they involve higher skills than those required in other electrical classifications, the provisions in the contract at bar, as well as in other IBEW contracts, only speak of experience in the trade — manifestly, a general characterization, which includes the whole gamut of electrical skills. In any event, the record indicates that the complainants do possess wireman's experience and, in fact, they had previously been referred to such jobs by the Respondent.

Thus, the only condition not fulfilled by the complainants to gain such priority status in Group I or II, as the case might be, was passing the wireman's examination. Since the Respondent deliberately made this an unattainable condition, it is not unreasonable to assume that, had the complainants been given the opportunity to take the examination, they would have passed it.[34] Indeed, the reasonableness of this assumption is indicated by the fact that all of the 103 members who had taken the examination had successfully completed it and shortly thereafter were placed in Group I or II. Moreover, one member who was shown the examination by Business Manager Cuvo in advance of its scheduled date, found the examination to be so easy that he advised his friends to be sure to take it. In any event, it appears to me that, under the circumstances of this case, equity and fairness demand that the burden of proving that the complainants would have failed the examination and thereby would have been ineligible for Group I or II status should rest on the Respondent which had unlawfully prevented the complainants from submitting to the test. As one court so aptly observed,[35] although in a different context, that "it rested upon the tortfeasor to disentangle the consequences for which it was chargeable." Since the Respondent has not demonstrated that the named complainants were incapable of passing the examination, and having found that all of them, except Kohl, have met the other qualifications for inclusion in Group I and *a*

34. Of course, the union-oriented questions, previously mentioned, would have no relevance.

35. *N.L.R.B. v. Remington Rand, Inc.*, 94 F. 2d 862, 872 (C.A. 2).





*fortiori* in Group II, I find that the Respondent violated Section 8(b)(2) and (1)(A) of the Act in not according them such priority status.[36] As for Kohl, I find that since he lacked employment of 1 year in the past 4 years under a collective-bargaining contract between the parties, the Respondent violated the same provisions of the Act with respect to him only in not placing him in Group II, which did not impose that requirement as a condition for inclusion in that group.[37]

The Respondent, nevertheless, argues, in defense, that the consolidated complaint should be dismissed with respect to all the complainants on the ground that they failed to pursue the contractual remedy for the adjustment of grievances regarding the administration of the referral system. As noted, above, the contract establishes an Appeals Committee, composed of a union representative, an employer representative and a public member selected by the other two, with authority to consider and make a final decision on applicants' complaints arising out of the operation of the referral system. I find no merit in the Respondent's contention.

There is no question that deferral to an arbitral forum is a

36. Whether and at what times jobs would have been available to the complainants will be determined in the compliance stage of this proceeding. Proof of job availability is not necessary to establish a violation under Section 8(b)(2) and (1)(A) of the Act. *Utility and Industrial Construction Company*, 214 NLRB 1053.

37. It appears that Kohl also satisfied the Group III requirement of 6 months employment in the past 3 years under the parties' contract.

discretionary matter.[38] Section 10(a) makes it clear that the Board's power "to prevent any person from engaging in any unfair labor practice . . . [cannot] be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . . ." I do not believe that it would serve the purposes of the Act to deny the complainants access to the Board to vindicate their statutory rights simply because they failed to submit their grievances to the Appeals Committee. Not only is the Respondent's Business Manager Cuvo, who is inextricably involved in the unfair labor practices alleged herein, a member of this Committee, but the employer-member, though not charged as a party respondent, is potentially responsible for the discriminatory administration of the hiring hall which it has agreed with the Respondent to establish as the exclusive source for recruiting electricians. In these circumstances, whether or not the employer-member of the Committee is unalterably disposed to support the Respondent's position, I find that a possible conflict of interest exists *vis-a-vis* the complainants. This appears to me to make the Appeals Committee an inappropriate forum for the impartial resolution of the complainants' grievances against the Respondent regarding the discriminatory treatment they allegedly received from the Respondent's operation of the hiring hall.[39] Accordingly, I find that the complainants did not forfeit their statutory rights by not submitting their complaints to the Appeals Committee.

38. *Collyer Insulated Wire*, 192 NLRB 837.

39. *Local Union 675, International Brotherhood of Electrical Workers, AFL-CIO (S & M Electric Co.)*, 223 NLRB No. 223.





Equally without merit is the Respondent's contention that the consolidated complaint should be dismissed because the complainants failed to exhaust the internal union remedies for redress of their wrongs, before filing the unfair labor practice charges in this case. Here, too, I find that, apart from the fact that most of the complainants were not members of the IBEW and therefore not bound by its constitution or bylaws, their right to resort to the Board for vindication of their statutory rights to be free from discriminatory treatment does not depend on the unavailability of internal union remedies.[40]

With respect to discrimination against Wilson

As discussed above, Business Manager Cuvo evicted Wilson, a former business manager and member of the Respondent, from the hiring hall, declassified him from Group II to "None," and barred him from using the Respondent's hiring hall to secure employment. It is the General Counsel's position that this treatment of Wilson was motivated by Wilson's opposition to Cuvo and the Respondent's President and Assistant Business Manager Benner and their administration of the hiring hall and union affairs and that the Respondent therefore violated Section 8(b)(2) and (1)(A) of the Act. Denying that it committed any unfair labor practices, the

40. In fact, Article VI, Section 3 of the collective-bargaining agreement provides, *inter alia*, that the nondiscriminatory "selection and referral [of applicants for employment] shall not be affected in any way by rules, regulations, by-laws, constitutional provisions, or any other aspect or obligation of Union membership policies or requirements."

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Respondent justifies Wilson's eviction on the ground that he had directed an obscene remark at Cuvo. As for the declassification of Wilson and its refusal to permit him to utilize its hiring hall, the Respondent urges that it took this action because Wilson lacked the qualifications for placement in any referral group, particularly Group II or IV. I find the Respondent's justification unsupported by the facts or the law.

It has been found that Wilson was provoked to make the obscene remark by Cuvo's refusal to tell him what his standing was on the referral list for the asserted reason that Wilson was not a member of the Respondent. Certainly, this remark, whose use in the hiring hall (or even in other respectable circles) is not an uncommon occurrence, was not so obnoxious as to justify excluding a job applicant from the hiring hall which he was utilizing to secure employment.[41] Moreover, viewing this eviction in light of Cuvo's subsequent conduct in removing Wilson from Group II to "None" so as to render him completely ineligible for referral from any group and in barring him from utilizing the hiring hall facilities, convinces me that the eviction was but the initial step in Cuvo's efforts to eliminate Wilson from the hiring hall because of his activities in opposition to the incumbency of Cuvo and Benner and the way they operated the hiring hall and handled union affairs. Admittedly, Cuvo and Benner were aware of Wilson's compaign against them and his determination to unseat them in the next election.

41. Cf. *International Union of Operating Engineers, Local 18, AFL-CIO,* 220 NLRB No. 29; *Philadelphia Typographical Union No. 2 (Triangle Publications, Inc.),* 189 NLRB 829.



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As indicated above, the Respondent, however, denies that the declassification of Wilson and his disqualification from using the hiring hall was improperly motivated. It argues that Wilson's experience in the electrical trade was acquired too long ago to be viewed as an adequate compliance with the Group II or IV requirements. For the same reason, the Respondent attaches no significance to its certification that in 1949 Wilson had passed an examination given by its Examining Board.

Concededly, there is absolutely nothing in the controlling collective-bargaining agreement of the parties restricting the qualifying experience to that gained in recent years.[42] Indeed, Cuvo, not only admitted that much, but also testified that he had unilaterally interpreted the agreement to require recent experience when he considered Wilson's registration application. This appears to be the first time that the contract was given that interpretation — at least, no evidence was produced to show otherwise. Moreover, apparently realizing the vulnerability of his interpretation, Cuvo, after having already declassified Wilson and denied him access to the hiring hall, submitted on September 26 his interpretation to the Labor-Management Committee for its approval. The Committee agreed with Cuvo's interpretation, determining that the phrase "worked at the trade for more than one (1) year" to qualify for inclusion in Group IV

42. In fact, where the parties thought it necessary to provide a time limitation for the acquisition of experience, provision was made for it in the contract. Thus, Group I requires employment of 1 year "in the last four years" under an agreement of the parties, while Group III requires employment of 6 months "in the last three (3) years" under an agreement of the parties.

meant that "no more than four (4) years have elapsed since the applicant has fulfilled this requirement." This construction of the requirement retroactively confirmed Cuvo's determination of Wilson's ineligibility for inclusion in Group IV. Although not specifically relied upon by the Respondent, the Labor-Management Committee on the same occasion also construed the Group IV requirement of "four or more years' experience in the trade" to mean "no more than four (4) years have elapsed since the applicant has fulfilled this requirement." This, in effect, also gave Cuvo retroactive support of his removal of Wilson from Group II. I further find nothing in the contract which justified Cuvo's disregard of Wilson's successful completion of Local 367's examination in 1949, as a qualifying factor, because it occurred in the distant past. Indeed, the contract expressly recognizes the continued vitality of examinations of that vintage by its inclusion in the definition of Local 367's qualifying examination "experience rating tests if such examination shall have been given prior to 1959." In sum, it is clear that the Respondent's retroactive alteration of conditions for placement and referral casts serious doubt on the purity of the Respondent's motivation for the treatment accorded Wilson, and betrays the pretextual nature of the reasons advanced for declassifying and depriving him of the right to seek employment through the Respondent's hiring hall.

In view of the foregoing, I am led to the inescapable conclusion that the action taken against Wilson was not dictated by legitimate considerations but by the enmity engendered in Cuvo by Wilson's fervent opposition to him and Benner whose defeat in the next union election Wilson was determined to bring



about. Under established law, Wilson's activities were protected by the Act and may not serve as a basis for depriving him of the right to seek employment through the exclusive hiring hall facilities which the Respondent was entrusted to administer fairly and equally without regard to a job applicant's union membership or nonmembership or his attitude toward union officials or their management of union affairs.[43] Accordingly, I find that, by discriminating against Wilson in the manner related above, the Respondent violated Section 8(b)(2) and (1)(A) of the Act. For the reasons discussed above with respect to the discrimination against the 11 named complainants, I further find that Wilson was not obligated to submit his complaint for adjustment to the Appeals Committee or to internal union procedures.

## IV. The Remedy

Pursuant to Section 10(c) of the Act, as amended, it is recommended that the Respondent be ordered to cease and desist from engaging in the unfair labor practices found and that it take certain affirmative action designed to effectuate the policies of the Act.

I have found that the Respondent has discriminated against job applicants Billcheck, Pollack, Russell, Meyer, Kohl,

43. *International Union of Operating Engineers, Local 406, AFL-CIO (New Orleans Chapter, Associated General Contractors of America, Inc.)*, 189 NLRB 255, 265; *Local Union 136, Muskingum Valley District Council (Frank Vlack Co.)*, 165 NLRB 1040, 1042.

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Nolasco, Makley, Sciascia, Phillips, Strunk and Wright by denying them the opportunity to take the inside journeyman wireman's examination on June 7, 1975 and by thus depriving all of them, except Kohl, of their right to be placed in Group I for referral purposes. As for Kohl, I have found that he was entitled to placement in Group II. It is therefore recommended that these individuals be placed in the indicated groups for referral to available jobs in accordance with the applicable provisions of the Respondent's current contract with NECA and its nondiscriminatory hiring hall rules and regulations, including registration in appropriate out-of-work books. Moreover, as additional redress for the discrimination practiced against them, it is recommended that they be made whole for any loss of earnings they might have suffered by reason of the discriminatory denial of job opportunities in Group I, in which all the complainants, except Kohl, were entitled to be placed, and in Group II in which Kohl should have been placed, by payment to each of them of the sum of money equal to that which each normally would have earned, absent the discrimination, from the date they first registered on the out-of-work list subsequent to the administration of the June 7, 1975 wireman's examination, less his net earnings during the said period of discrimination.[44] Backpay shall be computed with interest on a quarterly basis in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289 and *Isis Plumbing & Heating Co.*, 138 NLRB 716.

44. In accordance with Board policy, earnings from extra employment in which any of the above-named individuals regularly engaged before the discrimination, will not be considered in the computation.



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I have also found that Wilson was unlawfully removed from referral Group II and barred from using the Respondent's exclusive hiring hall facilities. To remedy such discrimination, it is recommended that he be restored to his Group II status previously given to him and that he be made whole for any loss of earnings he suffered by reason of the discrimination against him by payment to him of a sum of money equal to that which he normally would have earned from September 5, 1975, the date he first registered for employment in the out-of-work book, less his net earnings during the period of discrimination. Backpay shall be computed with interest as indicated above.

To facilitate the computation and to assure the discriminatees equal referral treatment, the Respondent shall maintain and make available to the Board or its agents, on request, job registration records and any other documents or records showing job referrals and the basis for such work assignments of employees, members, applicants and registrants. In addition, the Respondent shall notify the discriminatees that use of the hiring hall facilities will be available to them for referral on an equal basis with other registrants, members and nonmembers of its organization alike. Posting of the customary notice is also recommended.

Because of the serious nature of the unfair labor practices committed by the Respondent, it will further be ordered that the

Respondent cease and desist from in any other manner infringing upon employee rights.[45]

Upon the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

Conclusions of Law

1. NECA and its members are employers engaged in commerce within the meaning ofSection 2(6) and (7) of the Act.

2. The Respondent is a labor organization within the meaning of Section 2(5) of the Act.

3. By not permitting nonmember job applicants to take the inside journeyman wireman's examination, thereby denying them the opportunity for placement in priority referral Group I or II and limiting their opportunity for job referral under the exclusive hiring hall provisions of its contract with NECA, the Respondent attempted to cause and caused NECA's members to discriminate against the nonmember job applicants in violation of Section 8(a)(3) of the Act and the Respondent thereby violated Section 8(b)(2) of the Act.

4. By removing Wilson from his Group II classification and

45. *Local Union No. 121, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry*, 223 NLRB No. 193; cf. *N.L.R.B. v. Express Publishing Company*, 312 U.S. 426, 433; *N.L.R.B. v. Entwistle Mfg. Co.*, 120 F. 2d 532, 536 (C.A. 4).





placing him in a "None" classification as to render him ineligible for job referral under its exclusive hiring hall, mentioned above, and by barring him from using such facilities to secure employment, all in reprisal for his activities in opposition to the Respondent's incumbent officials and their handling of the hiring hall and union affairs, the Respondent similarly violated Section 8(b)(2) of the Act.

5. By reason of the discrimination against the nonmember job applicants and Wilson, as found above, the Respondent restrained and coerced employees in the exercise of their statutory rights within the meaning of Section 8(b)(1)(A) of the Act.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent has not engaged in the other unfair labor practices alleged in the amended consolidated complaint with respect to other nonmember job applicants to be in violation of Section 8(b)(2) and (1)(A) of the Act.

Upon the foregoing findings of fact, conlusions of law, and the entire record, and pursuant to Section 10(c) of the Act, as amended, I hereby issue the following recommended:[46]

46. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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## ORDER

The Respondent, Local 367, International Brotherhood of Electrical Workers, its officers, representatives, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to permit Gary Billcheck, Kenneth Pollack, William P. Russell, Edward C. Meyer, Lawrence V. Kohl, Patrick J. Nolasco, Olin A. Makley, Peter D. Sciascia, Carl Phillips, Samuel Strunk, Alfred L. Wright, or any other nonmember job applicant or registrant to take an inside journeyman wireman's examination in order to enable them to qualify for placement in priority referral Group I or II and thus to enhance their opportunities for referral to jobs under the exclusive hiring hall provisions of its contract with Penn-Del-Jersey Chapter of the National Electrical Contractors Association, because these individuals are not members of its organization or from otherwise attempting to cause or causing the contracting employers to discriminate against employees, job applicants or registrants in violation of Section 8(a)(3) of the Act.

(b) Removing George J. Wilson, Jr., from his Group II classification and placing him in a "None" classification as to render him ineligible for job referral under its exclusive hiring hall, mentioned above, and barring him from using such referral facilities to secure employment, in reprisal for his activities in opposition to the Respondent's incumbent officials and their handling of the hiring hall and union affairs.



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(c) In any other manner restraining or coercing employees, job applicants or registrants in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Place in Group I the individuals named in paragraph 1(a) of this Order, except Kohl who is to be placed in Group II, for referral to available jobs, as provided in "The Remedy" section of this Decision.

(b) Restore Wilson to the Group II referral status which had previously been assigned to him.

(c) Make whole the individuals named in paragraph 1(a) of this Order and Wilson for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in "The Remedy" section of this Decision.

(d) Notify, in writing, the individuals named in paragraph 1(a) of this Order and Wilson that the Union's exclusive hiring hall facilities and job opportunities will be available to them on an equal and nondiscriminatory basis with other members, employees, job applicants and registrants.

(e) Preserve and maintain and, upon request, make available to the Board or its agents, for examination and copying, job registration and referral records and any other documents or records showing job referrals and work

assignments, and the basis for making such referrals and assignments, of members, employees, job applicants and registrants, which are necessary to compute and analyze the amount of backpay due to the individuals named in paragraph 1(a) of this Order and Wilson and to determine their right to referral to jobs under the terms of this Recommended Order.

(f) Post at its business offices, hiring hall, and meeting places in Easton, Pennsylvania, copies of the notice attached hereto as an "Appendix."[47] Copies of said notice, on forms provided by the Regional Director for Region 4, after being duly signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director for Region 4, in writing, within 20 days from the receipt of this Order, what steps have been taken to comply herewith.

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47. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."



IT IS FURTHER ORDERED that the amended consolidated complaint be, and it hereby is, dismissed insofar as it alleges violations of Section 8(b)(1)(A) and (2) of the Act other than those found herein.

Dated, Washington, D.C.

s/ Paul Bisgyer
Paul Bisgyer
Administrative Law Judge

## APPENDIX

## NOTICE

## TO MEMBERS, EMPLOYEES, REGISTRANTS AND ALL OTHER JOB APPLICANTS, UNION OR NONUNION, USING OUR EXCLUSIVE HIRING HALL FACILITIES

## POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

After a trial at which all sides had the opportunity to give evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and ordered us to post this notice.

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WE WILL NOT refuse to permit Gary Billcheck, Kenneth Pollack, William P. Russell, Edward C. Meyer, Lawrence V. Kohl, Patrick J. Nolasco, Olin A. Makley, Peter D. Sciascia, Carl Phillips, Samuel Strunk, Alfred L. Wright, or any other eligible nonmember job applicant or registrant to take an inside journeyman wireman's examination to enable them to qualify for placement in priority referral Group I and II and thereby to enhance their opportunities for referral to jobs under the exclusive hiring hall provisions of our contract with Penn-Del-Jersey Chapter of the National Electrical Contractors Association, because these individuals are not members of our organization.

WE WILL NOT otherwise attempt to cause or cause the contracting employers to discriminate against employees, job applicants or registrants in violation of section 8(a)(3) of the Act.

WE WILL NOT remove George J. Wilson, Jr., from his Group II classification or place him in a "None" classification as to render him ineligible for job referral under our exclusive hiring hall, mentioned above, or bar him from using such referral facilities to secure employment, in reprisal for his activities in opposition to our officials and their handling of the hiring hall and union affairs.

WE WILL NOT in any other manner restrain or coerce employees job applicants or registrants in the exercise of their rights guaranteed in Section 7 of the Act.



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WE WILL place the individuals named above in the appropriate Group I or II for referral to available jobs in accordance with our contract with Penn-Del-Jersey Chapter of the National Electrical Contractors Association and our nondiscriminatory hiring hall rules and regulations.

WE WILL make whole the individuals named above for any loss of earnings they may have suffered by reason of the discrimination practiced against them.

WE WILL NOTIFY, in writing, the above-named individuals that our exclusive hiring hall facilities and job opportunities will be available to them on an equal and nondiscriminatory basis with our members, employees, job applicants and registrants.

LOCAL 367, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS
(Labor Organization)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green, Jr. Federal Building, 600 Arch Street, Suite 4400, Philadelphia, Pennsylvania 19106, Telephone (215) 597-7643.

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

LOCAL 367, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

and

GARY BILLCHECK, An Individual
Case 4-CB-2632-1

KENNETH POLLACK, An Individual
Case 4-CB-2632-2

WILLIAM P. RUSSELL, An Individual
Case 4-CB-2632-3

EDWARD C. MEYER, An Individual
Case 4-CB-2632-4

LAWRENCE V. KOHL, An Individual
Case 4-CB-2632-5

PATRICK J. NOLASCO, An Individual
Case 4-CB-2632-6

OLIN A. MAKLEY, An Individual
Case 4-CB-2632-7



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PETER D. SCIASCIA, An Individual
Case 4-CB-2632-8

GEORGE J. WILSON, JR., an Individual
Case 4-CB-2642

DECISION AND ORDER

On February 22, 1977, Administrative Law Judge Paul Bisgyer issued the attached Decision in this proceeding. Thereafter, the Respondent and General Counsel filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions[1] of the

1. The General Counsel excepts, *inter alia*, to the Administrative Law Judge's finding that, although the Respondent violated the Act by refusing to permit nonmembers to take an examination which was necessary for placement in the highest job referral categories, it did not violate the Act with respect to nonmembers not shown to have been otherwise qualified. We agree with the General Counsel that, the violation having been found, the extent of any consequent loss by nonmembers in addition to those specifically found to have suffered as a result is a question for the compliance stage of this proceeding. We shall modify the recommended Order and notice accordingly.

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Administrative Law Judge and to adopt his recommended Order except as modified herein.[2]

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Local 367, International Brotherhood of Electrical Workers, Easton, Pennsylvania, its officers, agents, and representatives, shall take the action set forth in said recommended Order, as so modified:

1. Substitute the following for paragraph 2(c):

> "(c) Place in the appropriate referral group any other nonmember registrant who was unlawfully denied the opportunity to take the June 7, 1975, examination without regard to the examination requirement."

2. Add the following as paragraph 2(d) and reletter the present 2(d) and the subsequent paragraphs accordingly:

2. Members Penello and Walther agree with the Administrative Law Judge that deferral to arbitration is not appropriate here. Chairman Fanning joins in that conclusion but would not defer in any event for the reasons set forth in *General American Transportation Corporation*, 228 NLRB No. 102, Members Penello and Walther dissenting.



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> "(d) Make whole those individuals encompassed by paragraphs 2(a), (b), and (c) of this Order for any loss of earnings they may have suffered by reason of the Respondent's unfair labor practices. Backpay will be computed in the manner set forth in the Remedy."

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. June 10, 1977

John H. Fanning,
Chairman

John A. Penello,
Member

Peter D. Walther,
Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO MEMBERS

Posted by Order of the National Labor Relations Board
An Agency of the United States Government

*Appendix B*

After a hearing at which all sides had the opportunity to give evidence, the National Labor Relations Board found that we violated the National Labor Relations Act and ordered us to post this notice.

WE WILL NOT refuse to permit Gary Billcheck, Kenneth Pollack, William P. Russell, Edward C. Meyer, Lawrence V. Kohl, Patrick J. Nolasco, Olin A. Makley, Peter D. Sciascia, Carl Phillips, Samuel Strunk, Alfred L. Wright, or any other eligible nonmember job applicant or registrant to take an inside journeyman wireman's examination to enable them to qualify for placement in priority referral Group I and II and thereby to enhance their opportunities for referral to jobs under the exclusive hiring hall provisions of our contract with Penn-Del-Jersey Chapter of the National Electrical Contractors Association, because these individuals are not members of our organization.

WE WILL NOT otherwise attempt to cause or cause the contracting employers to discriminate against employees, job applicants or registrants in violation of section 8(a)(3) of the Act.

WE WILL NOT remove George J. Wilson, Jr., from his Group II classification or place him in a "None" classification as to render him ineligible for job referral under our exclusive hiring hall, mentioned above, or bar him from using such referral facilities to secure



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employment, in reprisal for his activities in opposition to our officials and their handling of the hiring hall and union affairs.

WE WILL NOT in any other manner restrain or coerce employees job applicants or registrants in the exercise of their rights guaranteed in Section 7 of the Act.

WE WILL place the nonmember registrants who were not permitted to take the June 7, 1975, inside journeyman wireman's examination, in the otherwise appropriate Group for referral to available jobs in accordance with our contract with Penn-Del-Jersey Chapter of the National Electrical Contractors Association and our nondiscriminatory hiring hall rules and regulations.

WE WILL make whole these individuals for any loss of earnings they may have suffered by reason of the unfair labor practices we have been found to have committed.

WE WILL NOTIFY, in writing, the above-named individuals that our exclusive hiring hall facilities and job opportunities will be available to them on an equal and nondiscriminatory basis with our members, employees, job applicants and registrants.

LOCAL 367, INTERNATIONAL
BROTHERHOOD OF ELECTRICAL WORKERS
(Labor Organization)

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This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and most not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, William J. Green, Jr., Federal Building, 600 Arch Street, Suite 4400, Philadelphia, Pennsylvania 19106, Telephone 215-597-7643



## APPENDIX C — NATIONAL LABOR RELATIONS ACT 29 U.S.C. §151 *et seq.*

Section 8(b)(1)

"(b) It shall be an unfair practice for a labor organization or its agents —

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7:

Provided, that this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances; 29 U.S.C. §158(b)(1)."

Section 8(b)(2)

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; 29 U.S.C. §158(b)(2)."

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Section 10(a)

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith. 29 U.S.C. §160(a)."



## APPENDIX D — EXCERPTS OF COLLECTIVE BARGAINING AGREEMENT

"Section 8. — An Appeals Committee is hereby established composed of one member appointed by the Employer, one member appointed by the Local Union, and a Public Member appointed by both these members. In the event the Union Member and the Employer Member cannot agree upon such Public Member, the Public Member of the Benefit Board, to which the Employers under this Agreement make their pension contributions, shall appoint such Public Member of the Appeals Committee.

It shall be the function of the Appeals Committee to consider any complaint of any employee or applicant for employment arising out of the administration by the Local Union of Section 6.3 to 6.7 of this Agreement.

The Appeals Committee shall have the power to make a final decision on any such complaint which shall be complied with by the Local Union. The Appeals Committee is authorized to issue procedural rules for the conduct of its business, but it is not authorized to add to, subtract from, nor modify any of the provisions of this Agreement and its decisions shall be in accord with this Agreement.

*Appendix D*

Section 9. — Apprentices shall be hired and transferred in accordance with the apprenticeship provisions of the Agreement between the parties.

Section 10. — The parties hereto agree that, should any portion of this Article be found, by proper authority, to be in violation to the National Labor Management Act of 1947, then that portion will be deleted automatically, and the parties will confer and agree upon substitute language which will not be in violation thereof. It is further agreed that the parties will, in every manner, engage in hiring and employment practices within the letter and spirit of the said Act. It is further agreed that, should the said Act at any time be amended, this Agreement will be amended so as to provide the most complete union security and union hiring practices permitted by the Act."

No. 78-639

# In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 367, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

WADE H. McCREE, JR.
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*

JOHN S. IRVING
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

ROBERT E. ALLEN
*Acting Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

COLLIS SUZANNE STOCKING
*Attorney*
*National Labor Relations Board*
*Washington, D.C. 20570*

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### OPINIONS BELOW

The court of appeals enforced the Board's order without opinion (Pet. App. 1a-2a). The decision and order of the National Labor Relations Board (Pet. App. 5a-62a) is reported at 230 N.L.R.B. 86.

### JURISDICTION

The judgment of the court of appeals was entered on June 21, 1978. Petitioner's timely petition for rehearing was denied on July 18, 1978 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on October 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the Board is empowered to interpret the terms of a collective bargaining agreement for the purpose of devising an appropriate remedy for an unfair labor practice.

2. Whether, on the facts of this case, the Board properly determined the priority referral status to be accorded 11 named complainants and properly concluded that the status of 26 other complainants should be determined in subsequent compliance proceedings.

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, are set forth at Pet. App. 63a-64a.

## STATEMENT

1. Petitioner ("the Union"), pursuant to its collective agreement with electrical contractors in the Pennsylvania—New Jersey—Delaware area, maintains a hiring hall which serves as the exclusive referral source of electricians to the covered employers. The agreement provides a system of priority referral, which divides applicants into four groups with each applicant being assigned by the Union to the highest group for which he qualifies.[1] (Pet. App. 10a-11a.) The agreement mandates the Union to administer periodically a journeyman's examination which is a prerequisite to placement in referral groups I and II (Pet. App. 16a).

[1]The four referral groups are (Pet. App. 11a-12a):

GROUP I—All Applicants for employment who have four or more years' experience in the trade, are residents of the geographical area constituting the normal construction labor market, have passed a Journeyman's examination given by Local No. 367, I.B.E.W. * * * and who have been employed for a period of at least one year in the last four years under a collective bargaining agreement between the parties of this Agreement.

GROUP II—All applicants * * * who have four or more years' experience in the trade and who have passed a Journeyman's examination given by a duly constituted Local Union of the I.B.E.W. * * *

GROUP III—All applicants * * * who have two (2) or more years' experience in the trade, are residents of the * * * area * * * and who have been employed for at least six (6) months in the last three (3) years in the trade under a collective bargaining agreement between the parties to this Agreement.

GROUP IV—All applicants * * * who have worked at the trade for more than one (1) year.



In June 1975, the Union administered the journeyman's examination to its members, regardless of their work experience. All 103 members who took the test passed. Consequently, 87 of the members were moved from Group III to Group II and 16 moved from Group II to Group I (Pet. App. 19a, 21a-22a). None of the 37 non-Union applicants seeking work through the hiring hall during the relevant period was allowed to take the examination and, as a consequence, none was reclassified into a higher priority referral group (Pet. App. 18a-19a).

George Wilson, a past member and former business agent of the Union, had 20 years' experience as an electrician and had passed the journeyman examination given by the Union in 1949 (Pet. App. 26a-27a). In September 1975, Wilson registered for employment at the hiring hall and was classified in referral Group II (Pet. App. 27a). Later in the month, Wilson, who was on bad terms with the incumbent Union officers, had a heated dispute with Union Business Manager Cuvo over job referrals which resulted in the police being called to eject Wilson from the hall (Pet. App. 28a-29a). Shortly thereafter, Cuvo unilaterally changed Wilson's priority

referral status from Group II to NONE, ostensibly because Wilson's experience was too remote in time to qualify for any priority status (Pet. App. 29a-30a). The next day, when Wilson attempted to register, he was informed that he was barred from the premises and that trespassing charges would be instituted if he persisted in trying to enter (Pet. App. 32a-33a).

2. The Board, adopting (except in one respect) the decision of the Administrative Law Judge,[2] found that the Union violated Section 8(b)(2) and (1)(A) of the Act, 29 U.S.C. 158(b)(2) and (1)(A), by denying the 37 non-Union applicants the right to take the journeyman's examination because they were not members of the Union (Pet. App. 57a n.1, 36a).[2] The Board further found that, of the 11 non-Union applicants who testified at the hearing as to their qualifications, 10 were otherwise qualified for Group I status and one was qualified for Group II status (Pet. App. 37a-38a).[3]

The Board found an additional violation of the Act in the Union's actions in ejecting and barring Wilson from the hiring hall and in removing him from Group II

[2]The Law Judge concluded that, since no evidence was adduced at the hearing as to the eligibility under the collective agreement to take the journeyman examination of 26 of the nonmembers, the complaint should be dismissed as to them (Pet. App. 37a). The Board reversed the Law Judge on this point. It concluded (Pet. App. 57a n.1): "[T]he violation having been found, the extent of any consequent loss by nonmembers in addition to those specifically found to have suffered as a result is a question for the compliance stage of this proceeding."

[3]The Law Judge rejected petitioner's contention that the contract required four years' experience as an inside wireman. The Law Judge stated (Pet. App. 16a-17a):

> The contract * * * does not define what the phrase "experience at the trade" encompasses and it is reasonable to assume that it generally includes the full gamut of electrical skills in the trade and not, as the [Union] suggests * * *, only inside journeyman wireman's experience.



classification and placing him in a "none" classification, so as to render him ineligible for referral. The Board found that the Union's actions were motivated by hostility to Wilson based on his opposition to the Union's incumbent officers, rather than dictated by legitimate considerations as the Union contended[4] (Pet. App. 44a-45a).

In finding that the Union violated the Act, the Board rejected its contention that the complainants should have appealed to the contractually established Appeals Committee[5] and that the Board should have deferred to that body. The Law Judge stated (Pet. App. 40a; footnote omitted):

> I do not believe that it would serve the purposes of the Act to deny the complainants access to the Board to vindicate their statutory rights simply because they

[4]The Union contended that Wilson's reclassification was properly based on the remoteness of his experience and the time when he took the journeyman's examination (Pet. App. 43a). In rejecting this assertion, the Law Judge pointed out that nothing in the collective agreement restricted qualifying experience to that gained in recent years and that where there were restrictions for particular groups the agreement had stated them explicitly (Pet. App. 43a n.42). The Law Judge further noted that the contract expressly approved experience rating tests given prior to 1959. Finally, the Law Judge noted that the restriction applied to Wilson had been unilaterally adopted by business manager Cuvo and had never been applied before (Pet. App. 43a). Concerning the Union's reliance on the approval of Cuvo's interpretation by the contractually established Labor-Management Committee, the Law Judge pointed out that Cuvo secured the Committee's acquiescence only after he had disqualified Wilson (Pet. App. 43a).

[5]The contract establishes an Appeals Committee, composed of a union representative, an employer representative and a public member selected by the other two, with authority to consider and make a final decision on applicants' complaints arising out of the operation of the referral system (Pet. App. 12a-13a). None of the complainants filed a grievance with the Appeals Committee (Pet. App. 39a).

failed to submit their grievances to the Appeals Committee. Not only is the [Union's] Business Manager Cuvo, who is inextricably involved in the unfair labor practices alleged herein, a member of this Committee, but the employer-member, though not charged as a party respondent, is potentially responsible for the discriminatory administration of the hiring hall which it has agreed with the [Union] to establish as the exclusive source for recruiting electricians. In these circumstances, whether or not the employer-member of the Committee is unalterably disposed to support the [Union's] position, I find that a possible conflict of interest exists vis-a-vis the complainants. This appears to me to make the Appeals Committee an inappropriate forum for the impartial resolution of the complainants' grievances against the [Union] regarding the discriminatory treatment they allegedly received from the [Union's] operation of the hiring hall.

The Board ordered the Union, *inter alia*, to place the 11 individuals who were found to have been unlawfully denied Group I or II status in the appropriate referral groups, to place in the appropriate referral group any other nonmember registrant who was unlawfully denied the opportunity to take the June 7, 1975 examination without regard to the examination requirement, and to restore Wilson to Group II referral status (Pet. App. 51a). The order further requires the Union to make whole each of the above individuals for any loss of earnings he may have suffered by reason of the Union's unfair labor practices (*ibid.*).

3. The court of appeals enforced the Board's order without opinion (Pet. App. 1a-2a).



## ARGUMENT

Petitioner does not contest the Board's findings that it engaged in conduct prohibited by the Act when it denied non-members the right to take the journeyman's examination and changed Wilson's referral priority status. Rather, petitioner contends that the Board should have deferred to the contractual appeals committee instead of exercising jurisdiction, since its remedial order required an interpretation of the collective agreement (Pet. 10-12). The other claim is that the Board's order should not have applied to 26 employees who did not testify at the hearing (Pet. 12-13). These contentions are without merit and, in any event, present no question warranting review by this Court.

1. In *NLRB* v. *Strong*, 393 U.S. 357, 360-361 (1969), this Court held that:

> [T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not "affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise * * *." §10(a), 61 Stat. 146, 29 U.S.C. §160(a). Hence, it has been made clear that in some circumstances the authority of the Board and the law of the contract are overlapping, concurrent regimes, neither preempting the other. Arbitrators and courts are still the principal sources of contract interpretation, but the Board may proscribe conduct which is an unfair labor practice even though it is also a breach of contract remediable as such by arbitration and in the courts. *Smith* v. *Evening News Assn.*, 371 U.S. 195, 197-198 (1962). It may also, if necessary to adjudicate an unfair labor practice, interpret and give effect to

> the terms of a collective bargaining contract. *NLRB* v. *C & C Plywood Corp.*, 385 U.S. 421 (1967). [Citations and footnote omitted.]

There the court of appeals affirmed the Board's unfair labor practice findings, but refused to enforce its order that the company pay certain fringe benefits provided for in the collective agreement, finding that such an order was "beyond the power of the Board," 386 F. 2d 929 (9th Cir. 1967). In reversing, this Court stated that "an effective remedy for [unfair labor practices] is [the Board's] proper business [and] [t]o this extent the collective contract is the Board's affair * * *." 393 U.S. at 361.

In the instant case, the Board interpreted the collective agreement only insofar as it was necessary to provide an effective remedy for the discriminatees. *Strong* plainly recognizes the Board's authority to do so. Accordingly, insofar as petitioner challenges the Board's interpretation of the contract, the only issue actually presented is whether the Board erred in interpreting the phrase "experience in the trade" to cover "the full gamut of electrical skills in the trade" (*supra*, note 3), rather than limiting it to inside wireman's work. That question, which involves only the facts of this particular case, is not appropriate for review here.[6] *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

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[6]Contrary to petitioner (Pet. 6), the record does not establish that "the phrase 'experience at the trade' means experience as an "inside wireman." Petitioner argued to the Board that "inside," "outside," and "residential" wireman jobs are considered separate crafts. Petitioner relies on certain of its forms as making such distinction (A. 711A, A.714), but ignores others which do not refer to "wiremen" but, instead, indicate that "electrician," "lineman," "cable splicer" and "apprentice" are the distinct "trade" categories relevant to hiring hall referral and ask the applicant to specify his "Number of years experience in electrical trade" (A. 273, 387, 716). Moreover, the record supports the Board's conclusion that both the terms "the trade" and "wireman" are customarily understood as being more comprehensive than the Union contends. For example, there is testimony indicating that the terms "inside wireman" and "journeyman electrician" are commonly used interchangeably (A. 91), that "house wiring" is "wireman work" (A. 130), that certain electrical "maintenance" work is "journeyman wireman" work (A. 156), and that "residential" work is encompassed within "the trade" (A. 172).

"A." references are to the appendix to the parties' briefs in the court of appeals.



2. Petitioner contends (Pet. 12-13) that the Board has "impose[d] a finding of unfair labor practices and a remedy favoring persons for whom no evidence was taken," complaining that the "General Counsel produced no evidence that the 26 'other' persons were or could have qualified for work referral based on admittedly legitimate residence, experience or other factors."[7] This description mischaracterizes what the Board did here. The unfair labor practice which petitioner was found to have committed was discriminatorily denying nonmembers the right to take the qualifying test. The record evidence establishes that violation as to the 26 complainants who did not testify, no less than as to the 11 who did. The record also establishes that residence, experience and other factors were not prerequisites for the right to take the test. All members were offered the opportunity to take the test irrespective of such factors and all nonmembers were denied that opportunity.

Residence and experience are pertinent to proper classification in the priority referral system. However, the Board's order does not direct that the 26 complainants be

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[7]In the "Question Presented" (Pet. 3), petitioner urges that the Board's remedy should have been limited to ordering the Union to allow the nonmembers to take the qualifying test. Petitioner does not support this assertion in the "Reasons for Granting the Writ," nor does it quarrel with the Board's finding that the simplicity of the test was such that, on this record, it was clear that all who took it would pass (Pet. App. 21a-22a, 38a). In any event, the assertion raises only an evidentiary issue as to whether the latter finding is supported by the record.

placed in any particular referral group. It merely requires that these 26 individuals be placed in "appropriate" groups (Pet. App. 58a); none of them need be reclassified without offering the same sort of proof of adequate experience as the Union actually required of the 103 members it reclassified pursuant to the June 7 examination. In any subsequent backpay proceeding, the Union will have the opportunity to show that any particular claimant would not have been referred out of the hall even if the examination and subsequent reclassification procedure had been carried out legally.[8] See *NLRB* v. *International Longshoremen's and Warehousemmen's Union, Local 13*, 549 F. 2d 1346, 1355 (9th Cir.), cert. denied, 434 U.S. 922 (1977).

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[8]After a Board order has been entered, the Board's regional office administratively determines such compliance issues as reclassification and backpay. Where the respondent does not voluntarily accept the regional office's determination, the Board invokes administrative procedures which culminate in a decision by an Administrative Law Judge, which is reviewed by the Board. See Board's Rules and Regulations, 29 C.F.R. 102.52-102.59; Board's Statements of Procedures, 29 C.F.R. 101.16. Similarly, Board orders arising from compliance proceedings must be enforced by an appropriate federal court under Section 10(e) of the Act, 29 U.S.C. 160(e). See, generally, *NLRB* v. *Local 138, International Union of Operating Engineers*, 380 F. 2d 244, 245-246 (2d Cir. 1967).



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

JOHN S. IRVING
*General Counsel*

JOHN E. HIGGINS, JR.
*Deputy General Counsel*

ROBERT E. ALLEN
*Acting Associate General Counsel*

NORTON J. COME
*Deputy Associate General Counsel*

LINDA SHER
*Assistant General Counsel*

COLLIS SUZANNE STOCKING
*Attorney*
*National Labor Relations Board*

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